No. 88-541

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

State of North Carolina,

Petitioner,

v.

Joseph Mario Tarantino,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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REASONS WHY THE WRIT SHOULD NOT ISSUE

A. The State's Petition Is Untimely.

The opinion of the North Carolina Supreme Court was issued on June 2, 1988. Under North Carolina law, the mandate does

not issue for a period of twenty days. Assuming that the time for filing a Petition for a Writ of Certiorari does not begin to run until June 22, the time expired on August 22, 1988. See Sup. Ct. R. 20(1).

The Petition was not filed until September 28, 1988, over a month beyond the time permitted. The State offers no justification for submitting an untimely petition. Equally egregious, the State fails to mention in its Petition that it sought an extension of time that would have allowed it until August 31, 1988 to file the Petition, which was denied.

The State's cavalier disregard for the rules of this Court, and for the order of this Court denying an extension of time within which to file the Petition, justifies denial of the Petition.

B. The Decision Of The North Carolina Supreme Court Is Consistent With The Decision In ***United States v. Dunn***.

The issue presented to the North Carolina Supreme Court was whether, in light of ***United States v. Dunn***, 480 U.S. ___, 107 S.Ct. 1134 (1987), the owner of a non-residential building loses all reasonable expectation of privacy in the interior of that building because of the existence of a quarter-inch crack in the base of a wall between an enclosed porch and the next room. The North Carolina Supreme Court correctly rejected the State's argument that any opening, regardless of its size and location, negates all reasonable expectation of privacy in the interior of the building.

As it argued before the North Carolina Supreme Court, the State argues here that ***Dunn*** altered the mode of analyzing whether an expectation of privacy is

reasonable. ***Dunn***, however, did not alter the mode of determining the existence of a reasonable expectation of privacy. Rather, ***Dunn*** applied the well-established rule that what is in open view is not protected, and determined that the "essentially open" front of Dunn's barn eliminated any reasonable expectation of privacy from visual inspection. This analysis is consistent with the analysis followed since ***Katz v. United States***, 389 U.S. 347 (1967). ***Dunn*** did not adopt the position now espoused by the State that all analysis ends when one determines that the officer did not physically invade a protected area. [The State also ignores the fact that the officer here did enter Mr. Tarantino's building, without a warrant and based upon information he considered to be unreliable].

The State's argument rests upon its claim that the "essentially open" front of a barn is the same as a minute crack in a wall between an enclosed back porch and an interior room. This analogy simply does not work.

The steps taken by Mr. Dunn to secure the interior of his barn from visual inspection are a far cry from the steps taken by Mr. Tarantino. As the North Carolina Supreme Court observed, Mr. Tarantino locked and nailed shut his doors, and covered all of the windows. The only opening through which the interior of Mr. Tarantino's building could be viewed was a small crack in the rear of the building, inside the enclosed porch. Indeed, the crack itself was barely noticeable, and could only be peered through by someone crouching down and placing their face against the wall. In

addition, the building was in a remote area, unlikely to be visited by curious passers-by.

Mr. Dunn, in contrast, had a barn with an open front. He took only two steps to protect the privacy of the interior of the building; he placed fences around the land, and he draped fish-net over the opening. The first of these was simply designed to keep people from entering the land, and was therefore legally insufficient to create a reasonable expectation of privacy. ***See Oliver v. United States***, 466 U.S. 170 (1984) (holding that land surrounded by fences, and posted with no trespassing signs, is still an "open field" for fourth amendment purposes).

The second step was plainly inadequate, as anyone standing outside the barn could see through the fish-net. The State's attempt to equate the fish-net

with the crack in Mr. Tarantino's rear wall based upon the fact that the officers in *Dunn* stood near the fish-netting to see inside, is without merit. The State fails to mention that the search of Dunn's barn occurred at night, and that one would have to stand near the barn whether or not the fish-net was present. Had the officers been present during the day, they could have seen through the fish-net with little more trouble than looking through an open window. An open barn, covered only with fish-net, is simply not the same as a boarded-up building which can only be viewed through tiny cracks.

The North Carolina Supreme Court correctly recognized that this Court's analysis of Dunn's expectation of privacy in his open barn was based upon the application of established law to the facts of the case. The Court's decision that the

existence of a tiny crack does not negate all reasonable expectation of privacy is correct.

C. The Decision Of The North Carolina Supreme Court Is Consistent With The Decisions Of Other Courts.

The State argues that the decision here is inconsistent with decisions from other federal and state courts. Strangely, although the only issue decided by the North Carolina Supreme Court was whether *Dunn* eliminated any reasonable expectation of privacy in this case, the State does not cite a single post-*Dunn* decision. Contrary to the State's assertion, decisions prior to and following *Dunn* have recognized reasonable expectations of privacy in similar situations.

As observed by the North Carolina Supreme Court, decisions have consistently condemned the invasion of privacy inherent in this type of police activity. *See*

Bradshaw v. United States, 490 F.29 1097, 1101 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974) (reasonable expectation of privacy not eliminated by presence of crack where truck's doors did not fit snugly); ***Kroehler v. Scott***, 391 F. Supp. 1114 (E.D. Pa. 1975) (violation of Fourth Amendment for officers to peer through small ceiling vents); ***Lorenzana v. Superior Court of Los Angeles County***, 9 Cal.3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973) (officers violated Fourth Amendment by peering through drawn curtains); ***People v. Triggs***, 8 Cal.3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (illegal search where officers in maintenance access area peered through vents); ***People v. Lovelace***, 172 Cal. Rptr. 65, 116 Cal. App.3d 541 (1981) (reasonable expectation of privacy not eliminated by knotholes and cracks in six foot high wooden

fence); *State v. Biggar*, 716 P.2d 493 (Hawaii 1986) (reasonable expectation of privacy not eliminated by crack one-half to one inch wide where toilet stall door did not close properly); *Wheeler v. State*, 659 S.W.2d 381 (Tex. Cr. App. 1983) (officers violated Fourth Amendment in viewing interior of opaque greenhouse through open vents); *State v. Kaaheena*, 575 P.2d 462 (Hawaii 1978) (peering through one-inch gap in blinds covering window violates Fourth Amendment).

The post-*Dunn* decisions of other courts are consistent with this line of decisions, and with the decision of the North Carolina Supreme Court in this case. *See Riley v. State*, 511 So.2d 282, 286 (Fla. 1987) (missing panels in opaque greenhouse did not negate reasonable expectation of privacy); *State v. Waldschmidt*, 12 Ka.2d 284, 740 P.2d 617

(1987) (search conducted by climbing adjoining fence and peering into yard violated Fourth Amendment); *Commonwealth v. Lemanski*, 529 A.2d 1085 (Pa. Super. 1987) (viewing interior of greenhouse, from public vantage point, violated Fourth Amendment).

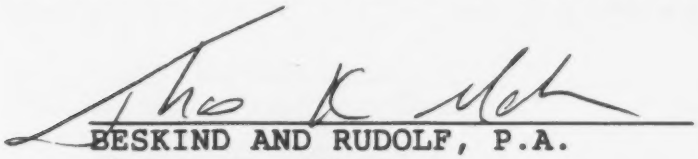
The decision below is consistent with decisions from other courts, both pre- and post-*Dunn*, and the writ should not issue.

CONCLUSION

The decision of the North Carolina Supreme Court is soundly based upon well established principles, and it properly enforces the Fourth Amendment's mandate that a citizen's privacy not be unreasonably infringed. There is no legitimate need to have police officers, acting upon the basis of unreliable information, entering private property and seeking out

any opening, no matter how small, through which to view the interior of a private building. Respondent respectfully prays that the Petition be denied.

This the 28th day of October, 1988.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this document in the above-captioned action upon all other parties to this cause by depositing a copy hereof, postage prepaid, in the United States Mail, properly addressed to the attorney for each party, as follows:

Mr. John H. Watters
Assistant Attorney General
North Carolina Dept. of Justice
Post Office Box 629
Raleigh, NC 27602

This the 28th day of October, 1988.

Thomas K. Maher
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Attorney for Respondent

85-060.P01